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ASSOCIATION OF AMERICAN

8 INTERNATIONAL MEDICAL

GRADUATES, INC.;

9 PANKAJ DESAI, M.D.;

10 EDUCATION INFORMATION

CONSULTANTS, INC.; and

11 EDUCATIONAL INTERNATIONAL

CONSULTANTS, LLC.

12 SABA UNIVERSITY SCHOOL OF

13 MEDICINE FOUNDATION

14 UNITED STATES DISTRICT COURT

15 DISTRICT OF NEVADA

16
17
18 ST. MATTHEW'S UNIVERSITY)
19 (CAYMAN) LTD., a Cayman Islands company,)

20 Plaintiff,)

21 vs.)

22 SABA UNIVERSITY SCHOOL OF)
23 MEDICINE FOUNDATION, a Netherland-)
24 Antilles company; MEDICAL UNIVERSITY)
25 OF THE AMERICAS, a St. Kitts & Nevis)
company; EDUCATION INFORMATION)

26 CONSULTANTS, INC., a Massachusetts)

corporation; EDUCATIONAL INTERNATIONAL)

27 CONSULTANTS, LLC, a Massachusetts)

limited liability company; PATRICIA L. HOUGH,)

28 M.D. an individual, and d.b.a. "Saba University)

School of Medicine"; DAVID L. EIC, an)

individual; PANKAJ EIC, M.D., an individual;)

ASSOCIATION OF AMERICAN)

Case No.: CV-S-05-0848- RCJ(LRL)

**DEFENDANT SABA
UNIVERSITY SCHOOL OF
MEDICINE FOUNDATION'S
MOTION TO DISMISS
PLAINTIFF'S AMENDED
COMPLAINT; AFFIDAVITS
OF DAVID L. FREDRICK AND
VINCENT F. O'ROURKE, JR.**

1 INTERNATIONAL MEDICAL GRADUATES,)
 INC., a Nevada corporation, a.k.a.)
 2 “aaimg@yahoo.com”; THOMAS MOORE, M.D.)
 a.k.a. “presaaimg@hotmail.com” and)
 3 “crocdoc2004@netzero.net,” an individual;)
 SARAH B. WEINSTEIN a.k.a.)
 4 “execsecaaimg@hotmail.com,” an individual;)
 5 RACHAEL E. SILVER, an individual; and)
 DIEDRE MOORE, an individual,)
 6)
 7 Defendants.)

8
 9 **DEFENDANT SABA UNIVERSITY SCHOOL OF MEDICINE FOUNDATION'S**
MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

10 Defendant SABA University School of Medicine Foundation (hereinafter “SABA
 11 University”) moves pursuant to Fed.R.Civ.P. 12(b)(2) to dismiss this matter on the grounds that this
 12 Court lacks personal jurisdiction over Plaintiff. In the alternative, SABA University moves to
 13 dismiss based on Fed.R.Civ.P. 12(b)(3) as venue is improper and based on Fed.R.Civ.P. 12(b)(4)
 14 as service of process was insufficient. Furthermore, SABA University moves pursuant to
 15 Fed.R.Civ.P. 12(b)(6) for the dismissal of the Second, Third, Fifth and Sixth claims of Plaintiff’s
 16 Amended Complaint on the grounds that the allegations of the Second, Third, Fifth and Sixth claims
 17 fail to state claims upon which relief may be granted.
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20 In support of this Motion, SABA University relies upon the Affidavit of David L. Fredrick
 21 and the Memorandum of Law which are being filed in support of SABA University’s Motion to
 22 Dismiss Plaintiff’s Complaint.
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ISSUES PRESENTED

- I. THIS COURT LACKS PERSONAL JURISDICTION OVER DEFENDANT SABA UNIVERSITY.**
- II. PLAINTIFF’S CLAIMS MUST BE DISMISSED PURSUANT TO FRCP 12(b)(3) ON THE GROUND THAT VENUE DOES NOT LIE IN THE DISTRICT OF NEVADA.**
- III. PLAINTIFF’S CLAIMS MUST BE DISMISSED PURSUANT TO FRCP 12(b)(4) ON THE GROUND THAT SERVICE OF PROCESS WAS INSUFFICIENT**
- IV. PLAINTIFF’S SECOND AND THIRD CLAIMS UNDER THE LANHAM ACT MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM UNDER 15 U.S.C. § 1126(b) & (h).**
- V. PLAINTIFF’S FIFTH CLAIM FAILS TO STATE A CLAIM FOR RELIEF UNDER THE NEVADA DECEPTIVE TRADE PRACTICE ACT.**
- VI. PLAINTIFF’S SIXTH CLAIM FAILS TO STATE A CLAIM FOR RELIEF UNDER THE CALIFORNIA COMPUTER CRIMES ACT.**

BACKGROUND

The Amended Complaint in this matter alleges that the Defendants named in the Amended Complaint jointly engaged in a conspiracy to injure the reputation of Plaintiff St. Matthew’s University (“SMU”), a Cayman Island British West Indies Corporation, by making fraudulent and defamatory statements on a domain allegedly maintained by Defendant Association of American International Medical Graduates, Inc. (“AAIMG”) in Russia. Plaintiff’s Amended Complaint (made solely “on information and belief”) makes no specific allegation of any statement or act of wrongdoing by SABA University. (Amended Complaint, ¶ 26.) Nor does the Amended Complaint allege that SABA University has any personal connection with the State of Nevada. Rather, the Amended Complaint alleges that SABA University is responsible for actions and statements allegedly taken by Defendants Thomas Moore, M.D. (“Moore”), Sarah B. Weinstein (“Weinstein”) and Rachael E. Silver (“Silver”) in establishing Defendant AAIMG in Nevada (Amended Complaint, ¶¶ 65-67) and for information posted on AAIMG’s website which has a domain hosted in Russia

1 (Amended Complaint, ¶ 62) and an e-mail address with its server in California (Amended
2 Complaint, p. 15 n.7).

3 SABA University is a Netherland-Antilles Company which conducts its business there. It
4 denies that it has ever done business in Nevada and that it in any way participated in the formation
5 and/or maintenance of AAIMG's corporate existence in Nevada or any other activities alleged in the
6 Amended Complaint. (Affidavit of David L. Fredrick in Support of Motion to Dismiss By SABA
7 University School of Medicine Foundation, hereinafter "SABA University Aff." at ¶¶ 4, 6-9.)
8 Consistent with that denial, the Amended Complaint totally fails to allege any specific actions
9 claimed to have been taken by SABA University in Nevada or elsewhere in furtherance of the
10 alleged actions of Moore, Weinstein, Silver, AAIMG or any other defendant. Thus, there is no
11 legitimate basis for SMU to request this Court to exercise personal jurisdiction over SABA
12 University in Nevada.
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15 **SUMMARY OF ARGUMENT**

16 SMU has failed to carry its burden of establishing that this Court has personal jurisdiction
17 or venue over SABA University, or that service of process on SABA University was sufficient. The
18 unsworn allegations of the Amended Complaint do not in any way rebut SABA University's sworn
19 denials that they participated in the matters complained of in the Amended Complaint in Nevada or
20 elsewhere.
21

22 SMU's Opposition also fails to establish its right to pursue its Second and Third Claim under
23 the Lanham Act. As a foreign entity, SMU may only pursue a claim under the Lanham Act if it has
24 such rights under a convention or treaty relating to unfair competition. Section 44 of the Lanham
25 Act codifies Congress' determination that there is no reason for the United States to afford a citizen
26 of a foreign country such rights if citizens of the United States are not accorded such rights by a
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1 treaty with that foreign country. SMU's Amended Complaint fails to allege and SMU has failed to
 2 put forward any such treaty, and for these reasons its Second and Third Claims must be dismissed.

3 SMU's Fifth Claim fails to state a claim for relief under the Nevada Deceptive Trade Practice
 4 Act because the Amended Complaint fails to allege any deceptive acts causing damage in Nevada
 5 or to its residents and may not be constitutionally construed to reach conduct and damages occurring
 6 outside of Nevada.
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8 Similarly, SMU's Sixth Claim must be dismissed because it fails to allege that SMU has
 9 standing under the California Computer Crimes Act or that it has suffered any loss in California or
 10 elsewhere as a result of any conduct prohibited by that statute.
 11

12 ARGUMENT

13 **I. THIS COURT LACKS PERSONAL JURISDICTION OVER** 14 **DEFENDANT SABA UNIVERSITY**

15 Plaintiff bears the burden of establishing personal jurisdiction over SABA University. See
 16 KVOS, Inc. v. The Associated Press, 299 U.S. 269, 278 (1936). In meeting this burden, the plaintiff
 17 cannot "simply rest on the bare allegations of its complaint." Schwarzenegger v. Fred Martin Motor
 18 Co., 374 F.3d 797, 800 (9th Cir. 2004); American Tel. & Tel. Co. v. Compagnie Bruxelles Lambert,
 19 94 F.3d 586, 588 (9th Cir.1996); Amba Marketing Systems, Inc. v. Jobar International, Inc., 551 F.2d
 20 784, 787 (9th Cir.1977). "[P]ersonal jurisdiction over a non-resident Defendant is tested by a two-
 21 part analysis. First, the exercise of jurisdiction must satisfy the requirements of the applicable state
 22 long arm statute. Second, the exercise of jurisdiction must comport with federal due process." Chan
 23 v. Society Expeditions, Inc., 39 F.3d 1398, 1404-1405 (9th Cir. 1994).
 24

25 Nevada law applies since Plaintiff seeks to obtain personal jurisdiction over SABA
 26 University in Nevada. Nevada's long arm statute permits the exercise of jurisdiction to the same
 27 extent as the Constitution. Nev. Rev. Stat. §14.065 (2001). Therefore, this Court should consider
 28

1 “the constitutional principles of due process which require that [SABA University] have minimum
 2 contacts with Nevada, such that the maintenance of the suit does not offend traditional notions of
 3 fair play and substantial justice.” Rio Properties v. Rio International Interlink, 284 F.3d 1007, 1019
 4 (9th Cir. 2002), quoting, International Shoe Company v. Washington, 326 U.S. 310, 316 (1945).

5 In performing this analysis, this Court conducts a three part test to determine whether specific
 6 jurisdiction can be exercised over a defendant. Id. This Court must determine whether (1) SABA
 7 University performed some act or consummated some transaction in Nevada by which it purposely
 8 availed itself of the privilege of conducting business in Nevada; (2) SMU’s claims arise out of
 9 SABA University’s forum - related activities; and (3) the exercise of jurisdiction is reasonable. Id.
 10 SMU’s Amended Complaint satisfies none of the foregoing criteria.

11 **A. Purposeful Availment**

12 The purposeful availment requirement is designed to ensure that a non-resident defendant
 13 will not be called to answer in a forum “based upon random, fortuitous or attenuated contacts with
 14 the forum.” Rio Properties, 284 F.3d at 1019; Burger King Corp. v. Rudzewiz, 471 U.S. 462, 475
 15 (1985). In a case such as this involving alleged tortious conduct, purposeful availment can only be
 16 found where a non-resident defendant’s contacts with a forum “are attributable to (1) intentional
 17 acts; (2) expressly aimed at the forum; and (3) causing harm, the brunt of which is suffered or which
 18 the defendant knows is likely to be suffered in the forum.” Rio Properties, at 1019. See also Calder
 19 v. Jones, 465 U.S. 783, 788-89 (1984); Core-Vent Corp. v. Noble Industries AB, 11 F3d. 1482,
 20 1485-1486 (9th Cir. 1993).

21 SABA University denies that it is responsible for any conduct complained of by Plaintiff,
 22 whether occurring in Nevada or anywhere else. (EIC Aff. at ¶ 6-8.) Even assuming that SABA
 23 University is responsible for the actions Plaintiff complains of, an assumption which is refuted by
 24 SABA University’s sworn Affidavit and which is not supported by any factual allegation in the
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1 Amended Complaint other than a conclusory allegation “on information and belief,” the simple
 2 action of incorporating an entity in Nevada, which subsequently registers a domain name which
 3 applies to a website hosted in Russia, (Amended Complaint, p. 16, Ex. H), and email servers located
 4 in California (Amended Complaint, p.15 at n.7) does not constitute substantial, purposely directed
 5 activity aimed at the State of Nevada. See Cybercell, Inc. v. Cybercell, Inc., 130 F.3d 414, 418-420
 6 (9th Cir. 1997). The Amended Complaint contains absolutely no allegation of any substantial
 7 conduct causing tortious injury occurring in or directed towards Nevada. Thus, personal jurisdiction
 8 is not appropriate because the conduct alleged “simply was not aimed intentionally at [the forum
 9 state] knowing that harm was likely to be caused there.” Id. at 420.

11 **B. Alleged Forum Related Activities**

12 The second requirement for personal jurisdiction is that SMU’s claims must arise out of
 13 Defendant’s Nevada related activities. The only Nevada related activity by anyone alleged in the
 14 Amended Complaint is the establishment of a corporate existence in the State of Nevada by AAIMG.
 15 (Amended Complaint, Exhibit E.) No damages flow to SMU simply from the establishment of a
 16 corporation which maintains an email address in California and a domain name in Russia. Rather,
 17 the damages claimed by SMU allegedly flow from the conduct of AAIMG in placing information
 18 from an unidentified location on the website which allegedly caused SMU to lose students at its
 19 schools located in the Cayman Islands and Maine. The wrong which SMU allegedly suffered does
 20 not arise from the existence of a corporation in Nevada but from AAIMG's posting of information
 21 on its website, which is not alleged to be hosted in Nevada. There is no allegation that information
 22 was authored or posted by anyone acting within the State of Nevada. Moreover, SABA University
 23 specifically denies that it had any involvement in any activity in connection with AAIMG or its
 24 website anywhere. (SABA University Aff. at ¶¶ 4, 6-9.) Thus, there is no allegation or proof that
 25 SABA University’s “intentional conduct [in Nevada] was calculated to cause injury to [SMU in
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Nevada].” Calder v. Jones, 465 U.S. 783, 791 (1984). There also has not been any showing that the allegedly wrongful acts were aimed at Nevada residents. In the absence of such a showing, this Court lacks personal jurisdiction over SABA University. See Bancroft of Masters Inc. v Augusta National, Inc., 223 F.3d 1082, 1087 (9th Cir. 2000).

C. Reasonableness.

In determining whether it is reasonable for a Court to exercise personal jurisdiction over a defendant, this Court considers seven (7) factors:

(1) the extent of a defendant’s purposeful interjection; (2) the burden on the defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant’s state; (4) the forum state’s interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff’s interest in convenient and effective relief; and (7) the existence of an alternative forum. See Core-Vent, 11 F.3d at 1488. As no single factor is dispositive, a court must balance all seven.

Rio Properties v. Rio Intl. Interlink, 284 F.3d 1007, 1020 (9th Cir. 2002).

The allegations in the Amended Complaint satisfy none of these criteria with respect to SABA University. SABA University is a resident of the Netherland-Antilles. (SABA University Aff. at ¶ 4.) It has no business, no residence and no business interests in the State of Nevada. (Id. at ¶ 6.) Its business is located in the Netherland-Antilles. (SABA University Aff. at ¶ 4.) SABA University has no relationships and never has had any relationships to Nevada and thus it would be extremely burdensome for SABA University, a resident of the Netherland-Antilles, to defend in this forum.

Similarly, Nevada has no interest in resolving this dispute. The conduct allegedly engaged in by the other Defendants was not alleged to have had any impact on anyone in Nevada. SMU also has no overriding reason for maintaining the action in Nevada. None of the alleged primary actors reside in Nevada. Indeed, none of the parties are located anywhere near Nevada. The major parties

1 to this case, SABA, MUA and SMU, are all located in the Caribbean. The damages allegedly
 2 suffered by SMU (the loss of students) would be suffered at its campuses in the Caribbean and in
 3 Maine and the witnesses and evidence related to such damages would be in the Caribbean and in
 4 Maine. It is therefore far more efficient to resolve this matter either in the courts of the Caribbean
 5 or in Maine, where SMU has a campus, (See Exhibit A to Affidavit of Vincent F. O'Rourke, Jr.) or
 6 in one of the foreign countries which has jurisdiction over these claims.
 7

8 In balancing these factors, this Court must weigh heavily the total lack of interest that Nevada
 9 has in this dispute, as the alleged conduct was not targeted at any residents of Nevada and caused
 10 no injury in Nevada. See Core-Vent Corp., 11 F.3d at 1486. For all of the foregoing reasons, this
 11 Court should dismiss the claims against SABA University because of the lack of personal
 12 jurisdiction over those claims.
 13

14 **II. PLAINTIFF'S CLAIMS MUST BE DISMISSED PURSUANT TO**
 15 **FRCP 12(b)(3) ON THE GROUND THAT VENUE DOES NOT LIE**
 16 **IN THE DISTRICT OF NEVADA.**

17 Plaintiff erroneously alleges that venue is appropriate in the District of Nevada pursuant
 18 to 28 U.S.C. §§1391(a) and (b). 28 U.S.C. §1391(a) provides:

19 A civil action wherein jurisdiction is founded only on diversity of
 20 citizenship may, except as otherwise provided by law, be brought
 21 only in (1) a judicial district where any defendant resides, if all
 22 defendants reside in the same State, (2) a judicial district in which
 23 a substantial part of the events or omissions giving rise to the claim
 24 occurred, or a substantial part of property that is the subject of the
 25 action is situated, or (3) a judicial district in which any defendant is
 26 subject to personal jurisdiction at the time the action is
 27 commenced, if there is no district in which the action may
 28 otherwise be brought.

28 U.S.C. §1391(b) provides:

A civil action wherein jurisdiction is not founded solely on
 diversity of citizenship may, except as otherwise provided by law,

1 be brought only in (1) a judicial district where any defendant
2 resides, if all defendants reside in the same State, (2) a judicial
3 district in which a substantial part of the events or omissions giving
4 rise to the claim occurred, or a substantial part of property that is
5 the subject of the action is situated, or (3) a judicial district in
6 which any defendant may be found, if there is no district in which
7 the action may otherwise be brought.

8 The Amended Complaint fails to allege the facts necessary to support a claim that 28
9 U.S.C. §1391 (a) or (b) authorizes venue in this District. First, venue does not lie under 28
10 U.S.C. §§1391(a)(1) or 28 U.S.C. §§1391(b)(1) because all defendants are not alleged to reside
11 in this District.

12 Second, venue does not lie under 28 U.S.C. §1391(a)(2) or (b)(2) because the Amended
13 Complaint does not allege that a “substantial part of the events giving rise” to the claims alleged
14 occurred in Nevada. In Myers v. Bennett Law Offices, 238 F.3d 1068, 1075-76 (9th Cir. 2001),
15 the Ninth Circuit recognized that, in construing 28 U.S.C. 1391(b)(2), the “substantiality of the
16 operative events is determined by assessment of the ramifications for efficient conduct of the
17 suit,” (quoting Lamont v. Haig, 590 F. 2d 1124, 1134-35 (D.C. Cir. 1978)), and that in a tort
18 action it is relevant to look to the place at which the harms were allegedly suffered by the
19 Plaintiff in determining where a substantial part of the events giving rise to the claim occurred.
20 Based upon SMU’s theory of the case, the only place in the United States where SMU would
21 have suffered damages from this tortious conduct would be in connection with its student
22 programs in Maine. (See Exhibit A, attached to Affidavit of Vincent F. O’Rourke, Jr.)
23 Moreover, it would be far more judicially efficient to venue this action in either Maine, where
24 SMU theoretically has suffered its damages, or Massachusetts, where SMU claims many
25 operative activities occurred. Both of these jurisdictions would be far more efficient from the
26 point of view of witnesses and documentary evidence than Nevada, which has little or no contact
27 with the action, the witnesses or the damages alleged. See Core-Vent Corp., 11 F.3d at 1486.
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Although the Amended Complaint makes allegation concerning activities allegedly taken by AAIMG, Moore, Weinstein, Silver and Diedre Moore who are alleged to have Nevada business addresses (Amended Complaint ¶5), it does not allege that any allegedly offensive behavior in connection with AAIMG's website which is hosted in Russia (Amended Complaint, ¶ 62), took place in the District of Nevada. Indeed, the wrongful actions are alleged to actually have been taken not by AAIMG or its officers but rather by Defendants Hough, Fredrick and Desai, none of whom are alleged to be residents of Nevada or to have ever actually performed any actions within the District of Nevada. (Amended Complaint, ¶¶ 3f and 3g, 48-72.) Thus, the Plaintiff's Amended Complaint contradicts its efforts to allege venue under 28 U.S.C. §§1391(a)(2) and (b)(2) by actually alleging that the conduct complained of was carried on by individuals and entities with no contacts with the District of Nevada and by failing to allege wrongful conduct causing injury in Nevada or occurring in Nevada. Where as here the alleged wrongful actions and damages arising from them do not occur in Nevada, venue does not lie in this District. See Sutain v. Shapiro and Lieberman, 678 F.2d 115, 117 (9th Cir. 1982); Magic Toyota, Inc. v. Southeast Toyota Distributors, Inc., 784 F.Supp. 306, 318-319 (D.S.C. 1992); Radical Products, Inc. v. Sundays Distributing, 821 F.Supp. 648, 650 (W.D. Wash. 1992); Meyer v. Reno, 911 F.Supp. 11, 15 (D.D.C. 1996); Medoil Corp. v. Clark, 753 F.Supp. 592, 597-598 (W.D. N.C. 1990).

Plaintiff's selection of the District of Nevada appears solely to be aimed at inconveniencing the defendants. Plaintiff is a foreign corporation which resides in the British West Indies. All of the defendants alleged to be actually responsible for the wrongs complained of are residents of distant states or Caribbean countries. None of the actions causing damage to Plaintiff are alleged to have been taken in Nevada and none of the injuries suffered by Plaintiff are alleged to have been incurred by Plaintiff in Nevada. The injury it allegedly suffers, the loss

1 of its reputation, is one which, if it actually had occurred, would evidence itself by monetary
 2 damages caused by a loss of students at Plaintiff's campus in the British West Indies or at its
 3 activities conducted in the State of Maine.

4 **III. THE AMENDED COMPLAINT AGAINST SABA UNIVERSITY SCHOOL**
 5 **OF MEDICINE FOUNDATION MUST BE DISMISSED PURSUANT TO**
 6 **FDRCP 12 (b)(4) FOR INSUFFICIENCY OF SERVICE OF PROCESS**

7 SMU contends that it effectuated service of the Summons and Amended Complaint on
 8 SABA University by delivery of the Summons and Complaint to Pankaj Desai, M.D. Pankaj Desai
 9 is not an officer or managing agent of SABA University and is not authorized by appointment or
 10 statute to act as its agent for the service of process. (See SABA University Aff., ¶ 5.) Therefore,
 11 adequate service has not been made on SABA University under the provisions of Fed.R.Civ.P. 4 (h)
 12 and the Amended Complaint must be dismissed pursuant to Fed.R.Civ.P. 12 (b)(4). See Wells Fargo
 13 & Co. v. Wells Fargo Express Co., 556 F.2d 406, 412 (9th Cir. 1977) ("Under Rule 4(d)(3), personal
 14 service "upon a domestic or foreign corporation" is effected by serving "an officer, a managing or
 15 general agent, or any other agent authorized by appointment or by law to receive service of process.
 16 ..."); Lynch v. Blake, 59 Haw. 189 (Haw. 1978) (**holding service of process on a trustee did not**
 17 **constitute proper service**).

18 **IV. PLAINTIFF'S SECOND AND THIRD CLAIMS UNDER THE LANHAM ACT**
 19 **MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM UNDER 15**
 20 **U.S.C. § 1126(b) & (h).**

21 Plaintiff, a foreign national, alleges unfair competition under the Lanham Act in Counts II
 22 and III of its Amended Complaint.¹ Plaintiff's allegations of unfair competition in violation of the
 23 Lanham Act fail to state a claim upon which relief can be granted and must be dismissed because
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 25

26
 27 ¹ In Count II, Plaintiff alleges unfair competition arising from alleged false and misleading
 28 statements under 15 U.S.C. § 1125(a). In Count III, Plaintiff alleges unfair competition
 arising from allegedly false statements of characteristics or origin under the same statute.

they fail to allege that Plaintiff has standing to proceed under the Lanham Act. See Fed.R.Civ.P. 12(b)(6).

Because SMU is a foreign entity incorporated in the Cayman Islands, (Amended Complaint, ¶ 3a), this Court's analysis of its right to proceed under the Lanham Act must begin with the language of Sections 1126 (b)² and (h)³, pursuant to which Congress provided the only cause of action for foreign nationals under the Lanham Act. Sections 1126 (b) and (h) extend the protections and remedies of the Lanham Act for unfair competition only to a foreign national whose "country of origin is a party to any convention or treaty relating to ... unfair competition, to which the United States is also a party, or extends reciprocal rights to nationals of the United States by law." 15 U.S.C. §1126 (b). In Larsen v. Terk Technologies Corp., 151 F.3d 140, 145-46 (4th Cir. 1998), the United States Court of Appeals for the Fourth Circuit ruled that Section 44 of the Lanham Act, 15 U.S.C. §1126:

extends the protections and remedies of the Lanham Act to any foreign national whose 'country of origin is a party to any convention or treaty relating to trademarks, trade or commercial names, or the repression of unfair competition, to which the United States is also a party, or extends reciprocal rights to nationals of the United States by law.' 15 U.S.C. § 1126(b), (g), (h). Larsen is entitled to the protections and remedies of the Lanham Act because Denmark and the United States are both parties to the International Convention for the Protection of Industrial Property of 1883 (the Paris Convention), *opened for signature* Mar. 20, 1883, 25 Stat. 1372, T.S. No. 379, as amended at Stockholm, July 14, 1967, 21 U.S.T. 1583, T.I.A.S. No. 6923. See 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 29:21, at 29-46, 29-49 (4th ed.1998).

² 15 U.S.C. §1126, also referenced as Section 44 of the Lanham Act, provides that "[a]ny person whose country of origin is a party to the convention ... shall be entitled to benefits [under §1126] to the extent necessary to give effect to any provision of such convention ..." 15 U.S.C. §1126(b).

³ 15 U.S.C. §1126(h) provides that any person covered by §1126(b) "shall be entitled to effective protection against unfair competition, and the remedies ... shall be available so far as they may be appropriate in repressing acts of unfair competition."

1 See also Scotch Whiskey Ass'n v. Majestic Distilling Co., 958 F.2d 594, 597 (4th Cir. 1992)(Section
2 1126(b) of the Lanham Act gives those persons whose country of origin is a party to a treaty relating
3 to unfair competition those benefits of Section 1126 necessary to give effect to the Treaty).

4 15 U.S.C. §1126(h) in turn authorizes foreign nationals to assert claims of unfair competition
5 if they have such rights under 15 U.S.C. §1126(b). After analyzing the legislative history of Section
6 1126, the United States Court of Appeals for the Third Circuit concluded that the statute clearly
7 limited the circumstances under which a foreign national could bring a Lanham Act claim:
8

9 This legislative history lends support to the following inferences and interpretations
10 limiting Section 44[Section 1126]:

11 1. Congress, by its discussion and rejection of the broad provision of H.R. 4744 of
12 the 76th Congress declaring all acts of unfair competition to be unlawful, revealed
13 an unwillingness to give federal courts jurisdiction of unfair competition claims [by
foreign corporations] to the full extent of its power to regulate commerce.

14 2. The intent of Congress was to implement international agreements which were not
15 self-executing and which varied in their coverage of practices in the field of unfair
competition.

16 3. By rejecting the suggestion that the unfair competition provision be placed in the
17 section providing remedy to registrants alone and by placing it in a separate section
18 in accordance with the suggestion that some conventions prohibit unfair competition
19 in respects other than the marking of goods, Congress manifested an intent to fashion
a remedy to coincide with rights growing from the respective international
agreements.

20 4. The effective protection against unfair competition granted in subsection (h) is
21 coextensive with the varying substantive provisions of the international
22 agreements....

23 L'aiglon Apparel v. Lana Lobel, Inc., 214 F.2d 649, 654 (3rd Cir. 1954). The L'aiglon Apparel Court
24 concluded: "[T]here was no need for such a limited declaration of jurisdiction over unfair
25 competition [claims by foreign nationals] if the Lanham Act had covered ... countless other
26 [situations] in a much broader grant of jurisdiction over all unfair competition in commerce." 214
27 F.2d at 654.
28

1 As further statutory support that foreign nationals are limited to actions under Section 1126,
 2 the definition of "person" in 15 U.S.C. § 1127 does not include foreign nationals:

3 The: term 'person' and any other word or term used to designate the applicant or
 4 other entitled to a benefit or privilege or rendered liable under the provisions of this
 5 Act includes a juristic person as well as a natural person. The term "juristic person"
 6 includes a firm, corporation, union, association, or other organization capable of
 suing or being sued in a court of law. (Emphasis added.)

7 The definition of person makes clear that it includes only those entitled to a benefit or privilege
 8 under the Act. This definition, therefore, must be read in conjunction with Section 1126 which
 9 specifically provides the extent to which a foreign national can bring an action under the Lanham
 10 Act. As a matter of statutory construction, a foreign national is not a "person" for purposes of
 11 Section 1125, as defined in Section 1127 because a foreign national, such as SMU, can bring an
 12 action for unfair competition only in accord with the provisions of Section 1126(b) and (h).¹

14 Thus, the unambiguous statutory language and the legislative history of Section 1126 of the
 15 Lanham Act creates a substantive federal law of unfair competition which limits those foreign
 16 nationals who are entitled to the benefits of the Lanham Act to those who have rights under treaties
 17 referenced in Section 1126 (b). See L'aiglon Apparel, 214 F.2d at 654. See generally Pagliero v.
 18 Wallace China Co., 198 F.2d 339 (9th Cir. 1952). Put simply, the purpose of 15 U.S.C. §1126 (h)
 19 is to extend protection to any foreign national whose country of origin is party to any convention
 20 or treaty relating to the repression of unfair competition and who meets the other requirements set
 21 forth in Section 1126(b). El Greco Leather Products Co. v. Shoe World, Inc., 599 F.Supp. 1380,
 22 1391 (E.D.N.Y. 1984), reversed on other grounds, 806 F.2d 392 (2nd Cir. 1986). If Congress
 23

25 ¹ SMU has argued that 15 U.S.C. §1121(a) that the district courts have original jurisdiction
 26 over causes of action under the Lanham Act regardless of the citizenship of the parties,
 27 and, therefore, this establishes that a foreign national can bring an action. This argument
 28 lacks merit because this statute merely establishes that a claim under the Lanham Act can
 be brought in federal district court, if properly pled, based on federal question
 jurisdiction, regardless of diversity of citizenship. This statute does not expand the
 substantive scope of the causes of action under the Lanham Act and does not provide
 SMU with a cause of action.

1 intended to give foreign nationals the unlimited right afforded by 15 U.S.C. §1125 (as claimed by
 2 SMU), there would have been no need for Congress to have enacted either 15 U.S.C. §1126 (b) or
 3 15 U.S.C. §1126 (h), which afforded rights under the Lanham Act only to a subset of foreign
 4 nationals - those from countries with qualifying treaties.

5
 6 In the instant case, Plaintiff is a foreign national. However, Plaintiff has not alleged the
 7 existence of any convention or treaty relating to the repression of unfair competition to which both
 8 the United States and the Cayman Islands are parties. Absent such an allegation, which is a
 9 necessary element to enable a foreign national to seek unfair competition protection under the
 10 Lanham Act, Counts II and III must be dismissed. This case can be contrasted with the Larsen case
 11 in which the Court permitted the case to proceed because the Plaintiff was a Danish national and the
 12 United States and Denmark were both parties to the International Convention for the Protection of
 13 Industrial Property of 1883. See Larsen, 151 F.3d at 145-46. See also Toho Co. Ltd. v. Sears,
 14 Roebuck & Co., 645 F.2d 788, 792-93 (9th Cir. 1981)(federal jurisdiction existed for foreign national
 15 based on treaty involving United States and Japan); Maison Lazard v. Manfra, Tordella & Brooks,
 16 585 F.Supp. 1286, 1289 (S.D.N.Y. 1984) (foreign national could bring action under the Lanham Act
 17 because the United States and France were signatories to the Paris Convention). Thus, unlike Larsen,
 18 Toho, and Maison, Plaintiff, as a foreign national, has failed to allege the necessary elements to bring
 19 an unfair competition under the Lanham Act and its Second and Third Claims must therefore be
 20 dismissed pursuant to Fed.R.Civ.P. 12 (b)(6).
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 22

23 **V. SMU'S FIFTH CLAIM FAILS TO STATE A CLAIM FOR RELIEF**
 24 **UNDER THE NEVADA DECEPTIVE TRADE PRACTICE ACT**

25 In its Fifth Claim, SMU alleges that Defendant's conduct violates the Nevada Deceptive
 26 Trade Practice Act, N.R.S. 598(3), (5)(7) and 15. However, N.R.S. Chapter 598 generally provides
 27 "for a public cause of action for deceptive trade practices." Nevada Power v. Eighth Dist. Court.
 28

1 102 P.3d 578 (2004) (emphasis added), and the Nevada Supreme Court has declined to recognize
 2 a private cause of action under that statute. Id. 102 P. 3d at 583 n.7. In any event, SMU's Amended
 3 Complaint fails to allege any conduct within the constitutional reach of the Nevada Deceptive Trade
 4 Practice Act because it fails to allege that any of the actions which allegedly caused damage to SMU
 5 occurred in Nevada or that any damages occurred to SMU in Nevada. It is of course axiomatic that
 6 the state has police power to regulate conduct occurring within its borders. See Gonzales v. Oregon,
 7 U.S. S.Ct. No. 04-623 (January 17, 2006). "Within its police power, the Legislature may regulate
 8 commercial and business affairs in order to promote the health, safety, morals and general welfare
 9 of its citizens and to protect its citizens from injurious activities." State Ex Rel List. v. AAA Auto
 10 Leasing, 93 Nev. 483, 486; 568 P.2d 1230 (1977). It is equally axiomatic that the state's police
 11 powers do not extend to conduct occurring outside its jurisdiction which is not alleged to have
 12 caused damages within its jurisdiction. "A state cannot impose punitive sanctions for conduct that
 13 affected other states but had no impact on the ...state or its residents." White v. Ford Motor Co., 312
 14 F.3d 998, 1016 at n. 68 and 1018-1020 (9th Cir. 2003). Since SMU's Amended Complaint totally
 15 fails to allege any act or conduct which warrants extension of the police powers of the State of
 16 Nevada to the Defendants, SMU's Fifth Claim based on the Nevada Deceptive Practice Act must
 17 be dismissed pursuant to Fed.R.Civ.P. 12(b) (6) for failure to state a claim upon which relief can be
 18 granted.
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20
 21
 22 Even assuming, as SMU contends, that it is appropriate to bring its claim under N.R.S.
 23 41.598, rather than under NRS 41.600,¹ SMU's claim must be dismissed because SMU's Amended
 24 Complaint fails to allege that any conduct that caused damage to SMU occurred within the State of
 25 Nevada or that any resident of the State of Nevada was injured by the conduct alleged in the
 26

27 ¹ But see Nevada Power Co. v. Eighth Judicial Dist. Court of Nevada, 102 P.3d 578, 583
 28 n.7 ("NRS Chapter 598 generally provides for a public cause of action for deceptive trade
 practices. NRS 41.600 ... provides for a private cause of action.")

1 Amended Complaint. The Amended Complaint simply alleges that Defendant AAIMG was
 2 incorporated in the State of Nevada. All other conduct alleged occurred outside of Nevada,
 3 including that the AAIMG website is hosted in Russia and that its email is serviced from California.
 4 No damage is alleged to have occurred in Nevada. If SMU suffered any damage at all it did so at
 5 its operations in Maine and in the Cayman Islands. The State of Nevada is not a national
 6 ombudsman. It may enact laws that regulate conduct that impacts its residents, but “cannot impose
 7 punitive sanctions for conduct that affected other states but had no impact on the ... state or its
 8 residents.” White v. Ford Motor Co., 312 F.3d 998, 1016 at n.68 and 1018-1020 (9th Cir. 2003).
 9

10 **VI. SMU’S SIXTH CLAIM FAILS TO STATE A CLAIM FOR RELIEF**
 11 **UNDER THE CALIFORNIA COMPUTER CRIMES ACT**

12 SMU’s Sixth Claim fails to state a claim under the California Computer Crimes Act
 13 (“CCCA”) because the Amended Complaint fails to allege the facts necessary to establish standing
 14 to proceed in a civil action under that Act. SMU’s Amended Complaint fails to establish that it has
 15 standing under this provision because it fails to allege that it is an “owner or lessee of [a] computer,
 16 computer system, computer network, computer program or data who suffers damage or loss by
 17 reason of a violation of any of the provisions of subdivision (c)” of Section 502 of the CCCA.
 18 Rather, the complaint alleges that Defendants accessed computers owned by Yahoo and Hotmail,
 19 entities not alleged to be affiliated with or represented by SMU. (Amended Complaint, p.15 n.7.)
 20

21 The Amended Complaint also does not allege that “a loss was suffered by reason of a
 22 violation of subdivision (c)” of Section 502. That section sets forth a variety of computer-related
 23 crimes involving activities such as unauthorized access to computers or computer systems and
 24 intentional damage or alteration of such systems. While, as SMU claims, California law may
 25 recognize computer related causes of action other than under Section 502, those causes of action are
 26 not alleged in SMU’s Sixth Claim and it must be dismissed.
 27
 28

CONCLUSION

The Amended Complaint in this matter against SABA University should be dismissed pursuant to Fed.R.Civ.P. 12(b)(2) because this Court lacks personal jurisdiction over SABA University. Alternatively, the Amended Complaint should be dismissed pursuant to Fed.R.Civ.P. 12(b)(3) because this Court is an improper venue for this action or pursuant to Fed.R.Civ.P. 12 (b)(4) for insufficient service of process. The Amended Complaint also fails to state claims for relief upon which relief can be granted in its Second, Third, Fifth and Sixth Claims and those Claims must be dismissed if this Court retains jurisdiction over SABA University.

**ALVERSON, TAYLOR
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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on April 7, 2006.

/s/ Eve Patrick

Employee of ALVERSON, TAYLOR,
MORTENSEN & SANDERS